Yountville, California

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

WINE WORLD, INC. dba BERINGER VINEYARDS, Employer, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Petitioner.	)	Case No. 75-RC-50-S 5 ALRB No. 41

DECISION AND ORDER DISMISSING PETITION

Following a Petition for Certification filed by the United Farm Workers of America, AFL-CIO (UFW), a representation election was held on October 27, 1975, among the agricultural employees of Wine World, Inc. dba Beringer Vineyards (Employer). The Tally of Ballots showed the following results:

UFW	45
No Union	10
Challenged Ballots	6
Total	61

Pursuant to Labor Code Section 1156.3 (c), the Employer filed timely objections to the election. On December 24, 1975, the Regional Director dismissed 12 of the said objections and set the remainder for hearing. The Executive Secretary subsequently dismissed another nine objections and ordered that a hearing be conducted as to the remaining four. These objections, all dealing with the issue of peak, are now before us en the records of two

separate hearings conducted on April 27 and 28, 1977, and on November 21, 1978, by Investigative Hearing Examiner (IHE) James E Flynn.

The Board has considered the Employer's objections, the record in each hearing and the IHE's Decisions, in light of the exceptions and briefs, and has decided for the reasons set forth below, to set aside the election.

Labor Code Section 1156.4 prohibits us from considering any petition for certification as timely unless it is filed when the Employer is at no less than 50 percent of its peak agricultural employment for the current calendar year. Initially, we reject the Employer's contention that we should consider only those employees who actually performed work during the eligibility week in determining whether this requirement has been met. The purpose of the peak requirement is to insure that the number of employees eligible to vote is representative of the overall labor force which will be affected and bound by the results of the election. Therefore, in order to determine whether the peak requirement has been met, it is necessary in this case to compare the number of employees eligible to vote with the number of employees at the peak of employment for the calendar year.

The IHE found that five of the six workers who had been denied ballots were eligible to vote as laid-off employees with reasonable expectations of re-employment, despite the fact that

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their names did not appear on the relevant payroll records.[1/] In coining to his conclusion, the IHE applied NLRB precedent which holds, that a layoff is presumed to be temporary and that laid-off employees with reasonable expectations of rehire are eligible to vote.[2/] Although the NLRB standard of "reasonable expectation of rehire" is not necessarily inconsistent with our own eligibility rules, we do not reach the issue here. We find that the five employees are indistinguishable from the seasonal employees discussed in Rod McLellan Co., 3 ALRB No. 6 (1977), and are therefore ineligible to vote.[3/]

The IHE attempted to distinguish the five Beringer employees from those in Rod McLellan on the grounds that the Beringer employees "worked substantial periods of time" for the Employer prior to layoff, the Employer permitted them to live in a Beringer camp during the eligibility payroll period, and the Employer made statements about re-employment to them. Testimony showed that the employees worked only two and one-half to six and one-half months for the Employer before their layoff in July 1975. Furthermore, despite a company policy allowing only employees to

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[1/] These five employees are Rafael Curiel, Roberto Alonzo Mendez, Reuben Paniagua, Ramon Vargas Plancarte, and Francisco Fernando Medina. The THE found that Manuel Medina was not an employee with an expectation of rehire and was therefore ineligible to vote.

[2/] NLRB v.Jesse Jones Sausage Co., 309 F.2d 664, 51 LRRM 2501 (4th Cir.1962); intercontinental Manufacturing Company, Inc., 192 NLRB 590, 77 LRRM 1857 11971).

[3/] In Rod McLellan Co., supra, we found ineligible two employees who did not work or receive wages during the applicable payroll period, but who were "on call" to work for the employer as needed. These employees were indistinguishable from seasonal employees who had not yet been hired for the harvest.

live in the camp, it is apparent that nonemployees, such as Manuel Medina, lived there.[4/] Representatives of the Employer made two statements which the IHE considered significant in determining eligibility. in July 1975, a Beringer foreman, when laying off four of the six workers, told them that they could live in the camp during the layoff and that there would be work for them at harvest. In August 1975, another foreman told the other two workers that they were on a rehire list. Such statements made to seasonal employees serve to inform them of the possibility of jobs during the harvest season and do not conclusively establish that laidoff employees have a reasonable expectation of re-employment. The evidence does not establish that the five employees are distinguishable from seasonal employees who have not yet been hired for the harvest. Therefore, we find that the five above-named employees are ineligible to vote and we do not include them in our peak estimate.

The IHE concluded that three agricultural employees, Antonio Arizpe, Salvador Cobian and Bibiano Zamora, were eligible to vote notwithstanding the fact that their names did not appear in the relevant payroll records, as he found that they were on sick leave during the eligibility period. We affirm his finding and conclusion because the evidence of their injuries, their employment histories, and the apparent sick leave policy of the Employer convince us that these employees fall within the

[4/] The record contains no evidence that Manuel Medina worked for the Employer during 1975. Although there was testimony that Medina was on a rehire list, we find that Medina was not an employee of the Employer during 1975.

eligibility guidelines set forth in Rod McLellan Co., supra. Adding these three names to the 57 employees who actually worked during the eligibility week, we conclude that 60 employees were eligible to vote in the election.[5/]

The Employer contends that we should net uphold the election because the election petition failed to meet the requirement of Labor Code Section 1156.4 in that it was filed when the Employer was at less than 50 percent of its peak agricultural employment for 1975. The Employer argues that its peak agricultural employment occurred during the week ending May 24, 1975, when 129 employees worked. The Regional Director used this figure as his estimate of peak. We have found that the number of eligible employees during the payroll period immediately preceding the filing of the petition was 60.[6/] While 60 is obviously not 50 percent of the estimated peak, the question presented here is whether the margin of error inherent in the peak estimate is reasonable. In Bonita Packing Co., Inc., 4 ALRB No. 96 (1978), we upheld an election in which 58 employees were eligible to vote and the Regional Director's estimate of peak employment was 119. There we found that the margin of error in the Regional Director's peak estimate was sufficiently small to warrant upholding the election. The Employer invites us to overrule the Bonita decision. We

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[5/] We adopt, pro forma, the IHE's conclusions that Francisco Andrade, Mary Jane Rossi, Enriquetta Dunck and Ed Tonito were not eligible voters and that Frank Sculatti and Daryll Shaw were eligible voters, as no exceptions were filed concerning these conclusions.

[6/] These figures are based upon the body-count formula we adopted in Donley Farms, Inc., 4 ALRB No. 66 (1978).

decline the invitation.

The second paragraph of Labor Code Section 1156.4 requires us to estimate peak. Given the setting in which this computation must generally be made, it can be no more than that: an estimate. When a petition for certification is filed, an employer may contest the peak allegation. Whether an employer contends that it has already experienced peak (past peak), or that it has yet to experience peak (prospective peak) in the current calendar year, its payroll records from prior years are critical in supporting either position. Other factors, such as a change in the types or varieties of crops planted, an increase or decrease in the acreage, or weather conditions, may in any given situation be determinative of the peak question. Generally, however, payroll records for prior years are the most important single factor in estimating peak employment for a current year. Such records provide a standard for comparison.

It is common Board practice to attempt to conduct a preelection conference on the fifth day following the filing of the petition for certification. The question of peak must be resolved by then. Because the employer has 48 hours from the filing of the petition in which to contest the peak allegation, the Regional Director must make an investigation and a determination as to peak within three days. A determination of the number of eligible employees during the payroll period immediately preceding the filing of the petition must also be made during this time. This task is facilitated by the payroll list itself, the pre-petition lists, and the availability of the employees for interviews.

The use of prior payroll records to establish a peak pattern is much more difficult. Payroll records in the agricultural setting can range from entries on adding machine tapes, or labor contractor's notebooks, or penciled ledgers, to computer printouts. Determining the number of agricultural employees from such records is no small task, as there usually are no ore-petition lists to help separate ineligible individuals such as supervisors, employer's close relatives, or confidential employees. Determining which of the employees were outside the appropriate bargaining unit because they worked in a packing shed or a cooler, or in a non-contiguous unit, may be difficult, if not impossible. Use of prior payrolls can at best establish an estimate of peak and generally a high estimate. Thus, in close cases, we are not inextricably bound to the Regional Director's estimate of peak employment. Rather, we look to the legislative purpose behind the enactment of Labor Code Section 1156.4. Its purpose is to insure that the total number of eligible employees is representative of the workforce who will be affected by the results of the election and may become involved in the collective bargaining process.

The Employer, citing Ranch No. 1, Inc., 2 ALRB No. 37 (1976), contands that the Board has indicated that a purely mathematical comparison of the employment figures from the eligibility period payroll and the payroll during the peak employment period will fully reveal whether a petition has been timely filed in a past-peak employment case. Ranch No. 1 was decided during the first six months of this Board's existence

when the complexities and intricacies of peak questions were difficult to foresee. To the extent that Ranch No. 1 is inconsistent with this opinion, it is hereby overruled.

In Bonita, the 58 eligible employees were 50 percent of 116. The Regional Director's estimated peak was 119. The figure of 116 resulted in a margin of error of 2.5 percent in the estimate of 119. In view of our comparison of a set figure (number of employees eligible to vote) with an estimate (the calendar-year peak figure) and the inherent difficulties involved in making the estimate, we concluded that such a margin of error was reasonable. In this case, the 60 eligible employees were 50 percent of 120. The Regional Director's estimate was 129.[7/] The margin of error here is approximately 7 percent. We find that margin of error unreasonable. Accordingly, the election will be set aside and the petition for certification will be dismissed.

ORDER

It is hereby ordered that the election in this matter

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[7/] The UFW urges us to reject this peak figure, arguing that changes in the Employer's operation caused the 1975 employment figures to be "unique" and "unrepresentative" of the Employer's usual employment figures. We reject this argument. Although we may review data for years other than the current calendar year, Labor Code Section 1156.4 states that an election petition is timely filed only if "the employer's payroll reflects 50 percent of the peak agricultural employment for such employer for the current calendar year for the payroll period immediately preceding the filing of the petition." (Emphasis added.)

be, and it hereby is, set aside, and that the petition herein be, and it hereby is, dismissed.

Dated: May 29, 1979

GERALD A. BROWN, Chairman

RONALD L. RUIZ, Member

HERBERT A. PERRY, Member

JOHN P. MCCARTHY, Member

CASE SUMMARY

Wine World, Inc. dba
Beringer Vineyards (UFW)

5 ALRB No.41
Case No. 75-RC-50-S

IHE DECISION I

In an election conducted on October 27, 1975, among the employees of the Employer, the Tally of Ballots showed 45 votes for the UFW, 10 votes for No Union, and 6 challenged ballots. The Employer timely filed post-election objections, and subsequently a hearing was conducted on four of its objections concerning peak employment determination.

The UFW argued that four employees not on the eligibility list were eligible, as they were absent on approved sick leave during the eligibility period. The ALO found that one of the workers was not absent due to disability as he had been cleared by a physician to return to his usual work but did not do so; therefore, he was not eligible to vote. The ALO found that, the other three employees were absent during the eligibility period due to disability. A foreman signed statements for these three employees making them eligible for worker's compensation payments, and the Employer's policy was to rehire disabled employees upon their recovery if work was available. Two of the three employees returned to work after recovering from their injuries and each of the three had worked substantial amounts of time for the Employer prior to being injured. The ALO concluded that these three employees were eligible voters.

Six other persons whose names were not on the eligibility list appeared to vote at the election. Declarations were submitted at the hearing stating that during the eligibility period they had a reasonable expectation that they would be reemployed during the 1975 harvest season, based on their being permitted to live in company housing prior to the harvest. One of these six was found ineligible by the ALO, due to certain gaps in the payroll records and the absence of time cards for the entire year. The ALO found that the other five were eligible to vote as they had a reasonable expectation of rehire and, during the eligibility period, had received compensation in the form of housing in return for being present and available for harvest work, which they expected because of statements and promises made by the Employer's foremen.

In determining the peak issue, the ALO found that the eligible voters consisted of the 57 employees on the list plus the three disabled employees and the five others laid off with reasonable expectation of rehire. As these 65 employees represent more than 50 percent of either the peak of 126.6 obtained by averaging, or the 129 obtained by employee count, the ALO found the petition was timely filed and recommended that the UFW be certified as the exclusive collective bargaining representative.

IHE DECISION II

On October 16, 1978, the Board directed reopening of the hearing to take evidence limited to the issue of whether the 1975 peak employment level of the Employer was unique in that a similar peak was never reached either before or since that year.

The ALO held that the issue was one of first impression and involved interpretation of the statute and Board precedent which appeared to limit evidence on peak agricultural employment to the calendar year in which the election was held, unless an employer contends that peak agricultural employment will not be reached until" some time after the election, per Ranch No, 1. The ALO held that statutory interpretation and overruling,distinguishing, or upholding Beard precedent are matters for the Board itself, and that the facts herein were not in substantial dispute.

BOARD DECISION

The Board affirmed the ALO's finding that the three disabled employees were eligible to vote, but concluded that the five employees, when the ALO found were laid off with reasonable expectation of rehire, were not eligible. Although these five employees were told by foremen that they could live in the camp during the layoff and that there would be work for them at harvest, the Board found that such statements made to seasonal employees serve to inform them of the possibility of jobs during the harvest season and do not conclusively establish a reasonable expectation of re-employment. The Board stated that although the NLRB standard of "reasonable expectation of rehire" is not necessarily inconsistent with its own eligibility rules, it did not reach the issue here. The Board concluded that the five employees were not distinguishable from seasonal employees who have not yet been hired for the harvest, and were therefore ineligible to vote, citing Rod McLellan Co., 3 ALRB No. 6 (1977).

The Board found that there were 60 eligible employees during the eligibility period. As the Regional Director's estimate of peak employment during the 1975 calendar year-was 129, the Board found that the question presented was whether the 7 percent margin of error inherent in the peak estimate was reasonable. In answer to the Employer's contention that Ranch No. 1, Inc., 2 ALRB No. 37 (1976) permits only a purely mathematical comparison of the employment figures from the eligibility period and the peak employment period in past-peak cases, the Board overruled Ranch No. 1 to the extent that it is inconsistent with this opinion.

The Board referred to Bonita Packing Co., Inc., 4 ALRB No. 96 (1978), wherein the Board upheld an election in which there were 58 eligible employees and a margin of error of 2.5 percent in the peak estimate of 119. The Board held that that margin of error was reasonable, but that the 7 percent margin of error in the instant case was unreasonable, and accordingly, set aside the election and dismissed the petition for certification.

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:

WINE WORLD, INC., dba
BERINGER VINEYARDS,
Employer,

Case No. 75-RC-50-S

and

UNITED FARM WORKERS OF
AMERICA, AFL-CIO,

Petitioner.

Gary P. Scholick, Littler, Mendelson, Fastiff & Tichy, for the Employer.

W. Daniel Boone, for the United Farm Workers of America, AFL-CIO.

DECISION

STATEMENT OF THE CASE

JAMES E. FLYNN, Investigative Hearing Examiner: This case was heard before me on April 27 and 28, 1977 in St. Helena, California. The United Farm Workers of America, AFL-CIO, (hereafter the "UFW") filed a petition for certification on October 20, 1975.[1/] By notice and direction of the Agricultural Labor Relations Board (Thereafter the "Board") , an election was conducted on October 27 among the employees of Wine World, Inc., dba Beringer Vineyards (hereafter the "Employer" or the "Vineyard").

[1/] Unless otherwise specified, all dates refer to 1975.

The tally of ballots was as follows:

UFW	45
No Union	10
Unresolved challenges	6
Total	61

The Employer filed timely objections to the election. By order dated December 24, the regional director dismissed 12 objections and set the remainder for hearing. The executive secretary of the Board subsequently dismissed nine other objections and ordered that this hearing be conducted to take evidence on the remaining four objections.

All parties were represented at the hearing and were given a full opportunity to participate in the proceedings. Both submitted post-hearing briefs.

Upon the entire record, including my observation of the demeanor of the witnesses, and after consideration of the arguments made by the parties, I make the following findings of fact, conclusions, and recommendations.

FINDINGS OF FACT

I. Jurisdiction

Neither the Employer nor the UFW challenged the Board's jurisdiction. Accordingly, I find that the Employer is an agricultural employer within the meaning of Labor Code Section 1140.4(c), that the UFW is a labor organization within the meaning of Labor Code Section 1140.4(f), and that an election was conducted pursuant to Labor Code Section 1156.3.

II. The Alleged Misconduct

The objections set for hearing allege four grounds for setting aside the election. First, the Employer alleges that the allegation made in the certification petition that the Employer's current payroll was 50 percent of peak agricultural employment was incorrect. Second, the Employer alleges that the Board and the regional director improperly and erroneously failed to dismiss the certification petition because the petition was not timely filed with respect to peak. Finally, the Employer alleges that in failing to dismiss the petition and in -conducting the election, the Board directly contravened Labor Code Sections 1156.3 and 1156.4 and 8 Cal. Admin. Code Section 20310(1975); re-enacted as 8 Cal. Admin. Code Section 20310(1976).

III. Operation of the Business

The Employer manages land owned or leased by Crosse & Blackwell Preferred Vineyard Properties (hereafter "Crosse & Blackwell") and used for the production of wine grapes. The Employer's operations are divided between the vineyard and winery departments.[2/] These departments are separate operations, each with its own set of books, management, personnel and profit and loss statements. The primary contact between the two departments occurs when grapes harvested by the vineyard department are transferred to the winery.[3/]

2/ There are other departments, such as sales and marketing, whose operations are not directly related to the issues in this case.

3/ Grapes harvested by the vineyard department are sent to the Beringer Winery in Napa, except on a few occasions when grapes are sold or traded to other wineries. The Beringer Winery gets 75 tc 30 percent of its grapes from the vineyard department.

The vineyard department is responsible for taking the grapes from planting of the vines to harvest. Overall responsibility rests with vineyard manager Roy Raymond. He is assisted by three ranch foremen and one maintenance foreman.[4/] The foremen directly oversee the work of agricultural employees who carry out normal vineyard operations, such as planting, pruning, tying, trellising, suckering, harvesting, and tractor driving. Raymond also employs a personal secretary and another clerical employee to assist him with general office duties and payroll work.[5/] The vineyard department also manages two labor camps owned by Crosse & Blackwell and assigns housing, on a space available basis, to employees who apply for residence in the camps.[6/]

IV. Timeliness of Petition with Respect to Peak

A. Current Payroll - Employees Eligible on List

The last payroll period prior to the filing of the certification petition was October 12 through 18. The number of employees

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4/ The ranch foremen at the time of the election were Roberto Lopez, Dennis Hall, and William Pickering. The maintenance foreman was Guy Sculatti.

5/ Raymond's personal secretary is Mary Jane Rossi. The other clerical employee is Enriquetta Dunck.

6/ The camps are in Knight's Valley in Sonoma and in Yountville in Napa. The election was conducted in front of the Yountville camp 7b» T<»3l property and buildings are owned by Crosse & Blackwell. The Vineyard pays and is responsible for upkeep and utilities.

working on each day of the period were as follows:[7/]

Day	10/12	10/13	10/14	10/15	10/16	10/17	10/18
Employees	-0-	56	57	48	43	48	-0-

In this period October 12 was a Sunday, and October 18 a Saturday. There was no turnover in the workforce. Only 57 persons worked during the payroll period, although there were days when all 57 did not work.

B. Current Payroll - Employees Absent Due to Disability

1. Basis for claim of eligibility

Four persons appeared to vote at the election and were challenged by Board agents on the ground that their names did not appear on the list of employees who worked during the relevant payroll period. They were Antonio Arizpe,[8/] Salvador Cobian, Bibiano Zamora, and Francisco Andrade.

Board agent Frank Lemus testified that he discussed the eligibility of these voters prior to the election with Regional Director Apolinar Aguilar and another Board agent. They decided that persons who appeared to vote claiming that their names were not on the list because of absence due to disability would be allowed to vote challenged ballots.

Manuel Castillo, a UFW observer at the election, testified that he signed declarations on behalf of each of the four and gave them to Lemus. The four voters were then permitted to vote under challenge.

7/ Employer Exhibits 3, 4, 5, and 6. Employer Exhibit 3 is a summary prepared from employee daily time cards and a computer printout. Employer Exhibit 4 consists of the employee daily time cards used to compile the summary. Employer Exhibit 5 is the computer printout. Employer Exhibit 6 consists of employee daily tonnage picked figures which appear on the daily time cards and are then transferred to the summary sheet and computer printouts.

8/ Arizpe was also known as Antonio Moya.

The declarations filed by Castillo are identical for each of the four voters.[9/] They state that the four were employees whose names were left off the eligibility list only because they were on sick leave and receiving disability payments. According to Castillo these declarations were prepared for him by UFW attorney Barbara Rhine before the election. He then signed the declarations when the employees appeared to vote. Castillo testified that the four told him that they were receiving disability payments, but that he did not personally know that they were.

2. Evidence of disability

None of the four employees testified at the hearing. Castillo's declarations as to their disability are hearsay and insufficient in themselves to support a finding. They do, however, supplement other more credible evidence in the form of Employer business records. These records indicate that three of the four employees were injured in work-related accidents prior to the election and that their injuries prevented them from returning to normal work until after the week used to determine eligibility to vote.

Payroll records, workmen's compensation claims, and accident investigation reports, kept by the Employer in its regular course of business, were entered into evidence as exhibits.[10/] Vineyard

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9/The declarations are UFW Exhibits 1 through 4.

10/ Employer Exhibit 5 consists of employee daily time cards showing the employees who worked in the eligibility period. Employer Exhibit 5 is a computer printout of employees based on Employer Exhibit 4. Employer Exhibit 7 is a summary of workmen's compensation claims for 1975 drawn from reports of injury or illness, accident investigation reports, and physician's reports contained in Employer Exhibit 8. Employer Exhibit 10 consists of the Employer's payroll records for calendar year 1975.. Employer Exhibits 12, 13, and 15 are summary sheet drawn from records' of the Winegrowers Foundation by Raymond on health benefit claims paid to Beringer employees.

manager Raymond identified the various records and explained their mode of preparation. The relevant records were made at or near the time of the employees' injuries by management personnel or physicians visited for treatment. I find that these records are trustworthy evidence upon which reasonable persons would rely in the conduct of serious affairs to show the names of employees injured, the cause and date of injury, and the length of absence from work because of the injury.

Raymond testified that an employee who sustains a job-related injury reports to his foreman. The foreman then fills out an accident investigation form. Raymond signs off on the form if he believes the injury is job-related, and this starts the payment of workmen's compensation. Forms for the four employees in question were signed by foremen Hall or Lopez and Raymond and were entered in evidence as part of Employer Exhibit 8. According to Raymond, the Employer's policy was to rehire disabled employees upon their recovery if work was available and the employees were in good standing with the company. While an employee was on disability leave, no payments were made into health insurance or pension funds since these items were computed as a percentage of wages paid. Raymond further testified that there were no employees on sick leave or vacation in the eligibility week and that all job positions had been filled.

Company records indicate that Arizpe was originally hired for work with Beringer on November 14, 1973,[11/] and that in 1975 he worked every payroll period but one between January 4 and September 27.[12/]

11/Employer Exhibit 8. The Employer's Report of Occupational Injury or Illness, line 12A, for Arizpe lists his original date of hire.

12/ Employer Exhibit 10.

Records also show that Arizpe was off work from September 26 to October 17 because of an injury to his hand sustained while driving a tractor; [13/] consequently, his name did not appear on the payroll for the week ending October 18. Arizpe later returned to Work during four payroll periods from November 29 through December 20. [14/]

Salvador Cobian was originally hired by the Employer on September 28, 1973. [15/] He worked in every payroll period between May 17 and August 30 in 1975. [16/] Records show that he was off work due to an injury to his hand beginning August 28. [17/] While the records do not specify the length of his disability, Castillo testified that Cobian appeared to vote wearing a cast on his hand.

Bibiano Zamora came to work for Beringer on June 6, 1974.[18/] In 1975 he worked every payroll period from March I through September 27.[19/] Records show that he was off work from September 22 to November 24 because of an injury sustained while lifting pipe in a vineyard.[20/] A physician's report on ...the injury estimated the period

13/Employer Exhibits 7 and 8.

14/ Employer Exhibit 10.

15/ Employer Exhibit 8.

16/ Employer Exhibit 10.

17/ Employer Exhibits 7 and 8. What appear to be physician's records on Cobian's injury are largely illegible. Records also indicate that the Employer contested its liability for Cobian[1]s claim, but there is no indication as to the reasons.

18/ Employer Exhibit 8. 197

19/ Employer Exhibit 10.

20/ Employer Exhibit 8. Employer also apparently contested its liability.

of disability for regular work as eight weeks, and for modified work as one week. Another physician's report states that Zamora could return to work on November 24. [21/] Records further show that he worked the payroll period ending October 25, but no other weeks for the remainder of the year.[22/]

Francisco Andrade was first hired by the Employer on May 3, 1974. [23/] He worked every payroll period between March 15 and August *2* in 1975.[24/] Records show that he was off work from July 28 through September 2 because of a twisted knee sustained while cleaning around grapes in a vineyard.[25/] A physician's report dated September 2 states that Andrade was ready to return to his usual work.[26/] Records also show that he returned to work for the payroll periods ending September 6 and 13, but did not work again for the Employer the remainder of the year.[27/]

Cobian, Zamora, and Arizpe worked in the payroll period ending May 24. This was the Employer's., period of peak agricultural employment.

3. Test applicable to eligibility of disabled employees.

The NLRB has held that a person who has the status of an employee on sick or disability leave at the time voter eligibility

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21/ Ibid.

22/ Employer Exhibit 10.

23/ Employer Exhibit 8.

24/ Employer Exhibit 10.

25/ Employer Exhibit 8.

26/ Employer Exhibits 7 and 8.

27/ Employer Exhibit 10.

is determined is eligible to vote in a representation election even though his or her name does not appear on the relevant payroll.[28/] An employee on sick or disability leave is presumed to remain in that status until recovery. A party seeking to overcome the-presumption must make an affirmative showing that the employee has resigned or been discharged.[29/]

The Board has taken a position concerning the eligibility of employees on sick or disability leave which is similar to that of the NLRB. In Rod McLellan Co., 3 ALRB No. 6 (1977) , the Board held that employees on unpaid sick leave may, under appropriate circumstances, vote. The Board thereby rejected its earlier rule laid down in Yoder Bros., Inc., 2 ALRB No. 4 (1976) that only employees who were paid or entitled to be paid for the applicable payroll period were eligible to vote. In doing so, the Board voted that it was "inequitable to grant the vote to employees who perhaps worked half a day for an employer, and to deny the vote to long-standing employees who happened to be absent during the single relevant payroll period." In deciding the eligibility of an employee on temporary sick or disability leave, the Board will consider such factors as the employee's history of employment, continued payments into insurance funds, contributions to pension or other benefit programs, and any other relevant evidence which bears upon the question of whether or not there was a current job or position actually held by them during the relevant payroll period.[30/]

28/NLRB v. Atkinson Dredging Co., 329 F.2d 158, 55 LRRM 2598 (4th Cir. 1964).

29/ Sylvania Electric Products, Inc., 119 NLRB 824, 41 LRRM 1188 (1957); Wright Manufacturing Company, 106 NLRB 1234, 32 LRRM 1365 (195

30/ Rod McLellan Co., 3 ALRB No. 6 (1977).

4. Facts in their legal context

The UFW argues that the four employees in question were all on disability leave and receiving workers compensation in the relevant payroll period and should be considered eligible to vote. The Employer argues that none of the four, in particular Francisco Andrade, should be considered eligible to vote because the evidence was not sufficient to show they were receiving disability payments.

The Employer further argues that even if they were receiving disability payments, they would not be eligible to vote because their job positions had been filled by other employees so that they would not have performed work but for an absence due to disability. Furthermore, the Employer argues, none of the employees in question received continued payments on their behalf to any insurance, pension, or other benefit programs. Finally, the Employer states in its post-hearing brief that Cobian and Rivas, an employee not at issue who appears in the disability records introduced in evidence, abandoned their jobs after filing disability claims, although no evidence was introduced to this effect at hearing.

The Employer's business records on disability show that foremen and vineyard manager Raymond signed forms approving disability payments for job-related injuries. This is consistent with Raymond's testimony on the Employer's procedures in such cases. All four were absent during the relevant eligibility period, but the evidence shows that only three of the four employees were absent due to disability. As pointed out by the Employer, a physician's report included as part of Employer Exhibit 8 indicates that Andrade was ready to return to his usual work and that he did so for two payroll periods in September. A therefore, find that his absence was not due to disability and that he was ineligible to vote.

The remaining three employees were absent during the relevant period due to disability. Records show that two of these employees, Zamora and Arizpe, returned to work after recovering from their injuries. Thus, the evidence shows that they would have worked but for their absence due to temporary disability. Each of the three had worked substantial amounts of time for the Employer prior to being injured. I do not find the fact that the Employer may have hired other employees to temporarily perform their jobs persuasive on the question of eligibility. Nor do I find the lack of continued payments into health, pension, or other benefit payments relevant in light of the evidence that some payments were tied to wages paid and in light of the fact that workers compensation is a kind of continued benefit payment provided in part by an employer. I, therefore, find that Arizpe, Cobian, and Zamora were eligible voters.

C. Current Payroll - Employees Laid Off With a Reasonable Expectation of Employment in the Future

1. Basis for eligibility

Six other persons appeared to vote at the election whose names did not appear on the list of eligible voters. They were Rafael Curiel, Roberto Alonzo, [31/] Reuben Paniagua, Ramon Vargas Plancarte, Francisco Fernando Medina, and Manuel Medina. Their claim to eligiability is contained in declarations filed on their behalf by UFW observer Castillo. [32/] The declarations, like those filed by Castillo on behalf of the four workers claiming eligibility due to

31/ Alonzo was also known as Roberto Mendez.

32/ The declarations are UFW Exhibits 5 through 10.

disability, were written by UFW attorney Rhine before the election and then signed by Castillo when the employees appeared to vote. The declarations are identical for each employee. They state that the six were eligible to vote because during the payroll period preceding the filing of the petition they had a reasonable expectation that they would be re-employed during the 1975 harvest seasons and that this expectation was based on their being told to live in housing belonging to the Employer because there would be work during the harvest. The declarations further state that the workers had to work small jobs to support themselves and their families, but had not taken permanent jobs elsewhere and would take a job with Beringer immediately upon being rehired.

None of the six employees testified at the hearing. Castillo's declarations are hearsay and insufficient in themselves to support a finding. Five persons, however, testified on the issue of the eligibility of these employees. They were Castillo, Raymond, Lemus, Dennis Hall, and Roberto Lopez.

The UFW raised the eligibility of these employees at the pre-election conference. Board agent Lemus testified that a decision was made, following discussions with the regional director, not to allow the six employees to vote, challenged or otherwise. He confirmed that the six appeared to vote, were refused challenged ballots, and that Castillo filed declarations on their behalf.[33/]

33/ While not directly at issue in this case, the decision not to allow the six employees to cast challenged ballots was erroneous. NLRB precedent clearly holds that employees laid off for economic reasons who have a reasonable expectation of returning to work in the future are eligible to vote. See All-American Distributing Co., Inc., 221 NLRB/NO. 155, 91 LRRM 1143 (1975).

2. Hiring and layoff policy

Vineyard manager Raymond testified that the Employer used the term "terminated" to refer to employees who were laid off and who would not be considered for rehire. The term "laid off" was applied to employees who were laid off and who would be considered for rehire. According to Raymond, all layoffs at the Vineyard were permanent, including the July 1975 layoff in question. Raymond stated that a laid off employee was required to complete a new application for employment in order to be rehired and that all laid off employees had the same chance of being rehired when work became available.

It is clear from Raymond's testimony on cross examination that, contrary to his direct testimony, some layoffs at the vineyard were temporary and that in these cases employees had a reasonable expectation of rehire. The Employer hires both regular and seasonal employees. The seasonal workforce is relatively stable with some employees working the majority of the year for the Vineyard. For example, two of the laid off employees in question worked half the year and Castillo worked over ten months. At the end of the work year, shortly after harvest, most of the seasonal employees go to Mexico and return beginning around January for the next work year. Raymond testified that the Employer views this slack period as a kind of vacation. Seasonal employees are paid a lump sum equivalent to six percent of gross wages in lieu of the paid vacations provided to regular employees. This money is used to pay for the return to Mexico and to support the seasonal employee during the slack period. Raymond testified that employees leaving at the end of a work year who are good workers are told that they can expect to be rehired upon their return if work *is* available. No evidence was presented

at the hearing to show whether labor needs at the Vineyard fluctuated yearly so that long-time employees could not expect to be rehired upon their return.

In addition to year end layoffs, it is clear that some layoffs during the work year are temporary and that employees involved have a reasonable expectation of rehire. According to Raymond, he sometimes lays off employees because of a lack of work, but tells them that they can continue living in the Employer's labor camps because he expects to have work and rehire them in *a* few weeks. This treatment differs from that given terminated or permanently laid off employees who are expected to find other housing.

The Employer's policy on employee residence in labor camps operated by the Vineyard is intertwined with its housing policy. Raymond testified that employees seeking housing in the camps made application for residence which he approved on a space available basis. Employer Exhibit 11 is a list of all employment applications giving labor camps as the employee's place of residence. Raymond testified that listing of the labor camp as residence did not mean that the person actually lived in the camp. It could mean that the person wanted to live in the camp, that he or she was already living there, or that he or she had no other address to give. Eight of the nine applications in the list give the employee's residence as the Yountville camp. None of these applications are from Castillo or the six employees in question, even though Castillo's uncontradicted testimony shows that he and the six were living in the Yountville camp at the time of the election. Castillo also testified that the Yountville camp had three barracks, and the State Roster of Labor Camps lists the capacity of the Yountville camp in 1975 as 18

persons. This evidence indicates that there were more employees residing at the Yountville camp than are shown on the applications introduced in evidence and that it was possible to obtain housing without going through the formal application process about which Raymond testified. Raymond admitted that no roster of employees living at the camp was kept.

Raymond testified that only current employees actually working or employees laid off with a reasonable expectation of rehire could live in the Vineyard's labor camps. No rent was charged to such employees. Camp housing was not considered as a part of employee compensation, but rather a benefit derived from employee status. Raymond was ultimately in charge of labor camp housing, but immediate responsibility for the Yountville camp rested with Roberto Lopez who was foreman on the ranch on which that camp was located. According to Castillo, Lopez was responsible for putting together harvest crews for Raymond, a fact which Lopez and Raymond denied. Dennis Hall, foreman at another ranch, however, testified that he drew his work crews from employees living at the Yountville camp because there was no housing at the ranch he managed.

3. Laid off employees — Rafael Curiel, Roberto Alonzo, Reuben Paniagua, Ramon Vargas Plancarte, Francisco Fernando Medina, and Manuel Medina

Sometime in July of 1975, Raymond ordered a sizeable reduction in the size of the Vineyard's workforce. Records show that the number of paychecks issued fell from 94 on July 5 to 73 on July 19 and 62 on July 26. The workforce then stayed at approximately 60 employees until after harvest when it fell to six employees before rising again in December.

Raymond testified that the July layoff was ordered

because of a lack of work. At the time employees were tying and suckering vines and driving tractors at the various ranches. The decision on which employees to lay off was made by Raymond on the recommendations of the foremen as to whom they wanted to retain.

Manuel Castillo appears to have been a trusted employee of the Vineyard. Records show that he worked ten of the 12 months of the 1975 work year and was again working at the Vineyard at the time of his testimony. He testified that on a Wednesday in July foreman Hall told him that he was going to lay off some workers. Later in the day, Castillo was present when Hall called the employees to be laid off. Among those called were Curiel, Alonzo, Paniagua, and Plancarte. Castillo heard Hall tell these' four workers that it was their last day, that their checks were not yet ready, but that he would get them and give them to Castillo for distribution at the Yountville camp. The four workers then asked Hall when there would be more work and were told that during harvest there would be work picking grapes. They asked what they were going to do until that time, and Hall replied that they could stay in camp until the start of harvest and then work on the harvest.

Prior to the layoff Alonzo worked about six and a half months for the Vineyard, Plancarte five and a half months, and Curiel and Paniagua two and a half months each. Curiel, Alonzo, Paniagua, and Plancarte all worked in the payroll period ending May 24. This was the Employer's period of peak agricultural employment.

About a month after the July 16 layoff and two or three weeks before the beginning of harvest, a second conversation between laid off employees and a foreman occurred. Castillo testified that on this occasion he was present at the Yountville camp when Roberto Lopez told Curiel, Paniagua, and Manuel Medina that he had their names

on a list of persons to be hired at harvest. Castillo testified that he saw the list to which Lopez referred, but could not see the names on the list.

Lopez denied this conversation, all responsibility for hiring harvest crews, and the existence of a list. He admitted on cross examination speaking to persons who came asking for work.

Two other employees, Francisco Medina and Manuel Medina, claimed eligibility to vote as employees laid off with a reasonable expectation of rehire. The Employer admits in its post-hearing brief that payroll records show that Fernando Medina was laid off on July 7. No evidence was presented at hearing as to the circumstances of his layoff. There is no evidence that Manuel Medina was laid off and payroll records do not show a record of employment for him.[34/] Medina, however, was present when Lopez made his statement about rehiring employees, and he and the other five employees in question all lived in the Yountville camp... Raymond testified, that if these employees lived in the camp, it was without his knowledge or permission.

Castillo testified on cross examination that the four employees laid off on July 16 were all working at temporary jobs

34/ The absence of Manuel Medina's name from payroll records does not conclusively show that he was not employed. Raymond testified that the primary evidence of employment is the employee's daily time card. These cards were only supplied for the peak and eligibility weeks. Testimony showed that in those two periods some employees whose names appeared on cards as working did not appear on the computer list of employees for the comparable period. Thus, absence of an employee's name from the computer list of employees for 1975 does not conclusively show that the employee did not work.

during the relevant eligibility period while continuing to live at the Yountville camp. According to Castillo, he was told by Curiel in August that he was working small jobs and that at the time of the election he was picking grapes for Charles Krug. Castillo assumed that Plancarte was working small jobs because he saw him leave the Yountville camp three or four times a week in the morning and return dirty in the evening. Alonzo told Castillo that he was working at a temporary job fixing a railroad for a salt company and was laid off there after the election. Paniagua told Castillo that he was working for some farmer whose name he could not recall.

The Employer admits in its post-hearing brief that its payroll records support Castillo's memory as to the lay off and the date. According to the admission, Curiel, Alonzo, Paniagua, and Plancarte were laid off on July 16, a Wednesday. Hall could recall the layoff and events described by Castillo only in general terms. Hall testified that any conversation would have been with all four employees because they were members of the same crew, but he could not recall the specific meeting on July 16. He stated that he would not have told employees that they would definitely be rehired, but only that there was a possibility of rehire. Hall testified further that he particularly would not have promised work to Curiel because he felt that Curiel was a bad worker and wanted to get rid of him; but evidence indicates that Curiel was laid off rather than terminated, and Raymond could not recall on cross examination whether Curiel was employed in calendar years subsequent to 1975. Hall stated that he would not have told the four employees that they could not continue living in the Yountville camp because he was not in charge of the housing there and did not have authority to make such statements.

The Employer contends that UFW evidence on this issue should be totally discredited because it is based on hearsay and the testimony of a biased witness. The Employer argues that the UFW's failure to produce any of the six employees in question at the hearing deprived it of the opportunity to cross-examine witnesses about their reasonable expectations of rehire.

I am not persuaded to discredit Castillo on the basis of bias. The evidence introduced at hearing by both parties on the eligibility of the six employees is based on the testimony of witnesses who could be said to have a bias in favor of the party on whose behalf they testified. Castillo was a UFW observer at the election and stated that he told other employees that he supported the UFW. Raymond is the top management person at the Vineyard. Hall and Lopez were ranch foremen, although Hall was no longer employed by the Vineyard at the time of the hearing. For these reasons I do not completely credit or discredit the testimony of any witness on the basis of bias, but instead rely on the consistency or inconsistency of testimony.

The Employer's argument that it was prevented from cross examining the six employees is also not persuasive. The standard for determining eligibility of these employees is objective evidence, rather than their subjective perceptions. The Employer had the opportunity to examine and cross examine witnesses who provided the objective evidence. While the UFW did not produce the employees as witnesses, the Employer did not provide evidence from its records as to the seasonal pattern of layoff and hiring over a number of years.

I do not discredit Castillo as requested by the Employer,

because of his demeanor on the stand; his lack of familiarity with the English language, particularly that contained in the declarations; and his admissions on cross examination that he did not know personally whether certain facts contained-in his declarations were true. Under intensive and skillful cross examination by Employer's counsel, Castillo's testimony remained generally consistent with statements contained in the declarations. He was able to read the declarations haltingly, but with no substantive errors. The apparent variance between his testimony and the declarations as to his knowledge of certain facts was due to a misunderstanding as to the basis for his knowledge. Thus, some of the facts contained in the declarations were not based on his personal knowledge, but on statements made to him by the laid off employees or on conclusions drawn by him from his observations and experiences at the Vineyard. For example, the Employer's post-hearing brief argues that Castillo's declaration states that the Medinas were told to continue living in company housing, while his testimony at hearing was that he never heard such a statement made and that this shows an inconsistency. The record shows that the basis for Castillo's knowledge is not his having heard such statements, but the Medinas' continued residence in company housing and his knowledge of company policy, which corresponds to Raymond's, that persons not working for the Vineyard could not live in the camp. Thus, his testimony is not inconsistent with the declarations.

The only uncontradicted evidence is that all of the six employees, with the exception of Manuel Medina, worked for periods of from two and a half to six and a half months for the Employer prior to being laid off in July; that all six, including Manuel Medina, continued to live in the Yountville labor camp; and

that residence in company labor camps was reserved for current employees or those laid off with a reasonable expectation of rehire. The dispute, therefore, revolves around the question of whether their layoff was permanent or temporary, whether the employees had a reasonable expectation of rehire, and the testimony of various witnesses to be credited on these subjects.

I credit Castillo's testimony that Curiel, Alonzo, Paniagua, and Plancarte were told by Hall that they could continue to live in the Yountville camp and work on the harvest. Castillo remembered the event in detail, including the day of the week the conversation occurred. In contrast, Hall's testimony was general and speculative. While his failure to remember the specific events in question which occurred more than a year before his testimony seemed genuine, I cannot discredit specific testimony such as Castillo's on the basis of such a general denial.

I do not credit Lopez's denial that he told Curiel, Paniagua, and Manuel Medina that he had their names on a list of persons to be hired for harvest. Lopez's denial of any responsibility for hiring was inconsistent with both Castillo's and Hall's testimony. According to Castillo, Lopez put together harvest crews for Raymond. Hall testified that he and other foremen could hire with Raymond's approval. Thus, while foremen did not have the final say in hiring, they did exercise substantial authority through their recommendations over who was hired and fired. This was inconsistent with Lopez's total denial of responsibility. Furthermore, in spite of hard cross examination, Castillo continued to strongly assert that he had seen Lopez with a list to which he referred when the employees asked him about work. Finally, Hall testified that work crews at his ranch were supplied by Lopez from

employees living at the Yountville camp.

Raymond's testimony that he intended the July layoff to be permanent was inconsistent with his other testimony as well as with that of other witnesses and is discussed in detail in subsection 6 below.

5. Test applicable to eligibility of laid off employees.

Courts have upheld NLRB decisions that employees who are laid off for economic reasons and who have a reasonable expectation of reemployment at the time when voter eligibility is determined are eligible to vote in an election for a bargaining representative.[35/] The rationale behind this rule is that an employee who is laid off with the reasonable expectation of being called back to work as soon as the employer's business picks up has a continuing interest in the terms and conditions of employment to which he or she will probably return and, therefore, in the selection of bargaining representative.[36/] The rule has been applied by the NLRB not only to year-round industries but also to seasonal ones.[37/] The test of whether a reasonable expectation of reemployment exists is not an employee's perception, but objective evidence.[38/]

35/ NLRB v. Jesse Jones Sausage Co., 309 F.2d 664, 51 LRRM 2501 (4th Cir. 1962), citing Schobell Chemical Co. v. NLRB, 267 F.2d 922, 44 LRRM 2366 (2nd Cir. 1959) ; NLRB v. Freshn'd Aire Co., 226 F.2d 737, 30 LRRM 2732 (7th Cir. 1955); Whiting Corp. v. NLRB, 200 F.2d 43, 31 LRRM 2132 (7th Cir. 1952); Marlin-Rockwell Corp. v. NLRB, 116 F.2d 586, 7 LRRM 353 (2nd Cir.) 8 LRRM 458 (1941).

36/ Marlin-Rockwell Corp. v. NLRB, supra, note 35; D & H Farms, 192 NLRB 53, 77 LRRM 1721 (1971).

37/ NLRB v. Jesse Jones Sausage Co., supra, note 35.

38/ All-American Distributing Co., Inc., supra, note 33.

A layoff is presumed temporary in the absence of sufficient evidence to the contrary; mere assertion that a layoff was permanent does not rebut the presumption.[39/] This presumption is rooted in the policy of enfranchising all eligible employees and of placing the burden of disproving eligibility on the party who questions an employee's eligibility.[40/] Because the presumption is rooted in policy, it is one which affects the burden of proof.[41/]

In determining whether a reasonable expectation of recall exists, the NLRB looks for evidence of an employer's seasonal pattern of layoff and recall; statements made by supervisors about the likelihood of recall; the employer's policy on layoff and recall; the reasons for the layoff; and a decline in hiring over time, other than that due to seasonal fluctuation.[42/] Mere assertions that a layoff was temporary or permanent are not determinative in the face of objective evidence to the contrary.[43/]

6. Facts in their legal context

It is clear that all the employees in question with the exception of Manuel Medina were laid off. These layoffs must be presumed temporary under NLRB precedent unless the Employer presents sufficient evidence to the contrary. Raymond's testimony on the Vineyard's policy on layoff and recall contained one major inconsistency. He stated that all layoffs of employees were permanent and

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39/ Intercontinental Manufacturing Company, Inc., 192 NLRB 590, 77 LRRM 1857 (1971).

40/ See Labor Code Section 1157; 8 Cal. Admin. Code §20350(1975); re-enacted as 8 Cal. Admin. Code §20355 (1976).

41/ Evidence Code Sections 605 and 606.

42/ See note 35 and cases cited therein.

43/ See Intercontinental Manufacturing Company, Inc., supra, note 39

that he intended the July layoff to be permanent, but on cross examination admitted that sometimes employees were laid off and told to continue living in company housing because he expected to rehire them in several weeks. The latter statement is consistent with Castillo's testimony that a person could not stay in the Vineyard's labor camps unless he or she was an employee. Furthermore, an inference may be drawn from Raymond's testimony as to what employees were told about prospects of rehire at the close of a work year that employees in good standing were encouraged to return and given an expectation of rehire.

The Employer introduced no evidence on its seasonal pattern of layoff and recall for years other than 1975. Records for that year show that the harvest workforce was substantially smaller than the workforce used for suckering and tying. Records for other years would show whether this was the normal pattern or whether the harvest workforce was usually equal to or large?: than the tying and suckering workforce so that laid off employees could be said to have a reasonable expectation of rehire. The reason for the layoff was clearly a lack of seasonal work rather than an overall decline in the Employer's business operations. The length of the layoff is not determinative unless the evidence showed that employees laid off that long could not expect to be rehired, given the Employer's normal employment patterns.

The fact that the five employees in question were working temporarily at other jobs while waiting to be rehired is not determinative absent evidence that it was not common practice among

employees laid off under these circumstances to do so. [44/] There was no evidence to show that the employees had accepted permanent employment elsewhere. Their continued residence in company housing and contacts with Lopez affirmed the continuing employee-employer relationship with the Vineyard,

Similarly, the fact that the five employees had not been rehired at the time eligibility was determined is not critical. Their eligibility turns on whether they had a reasonable expectation of rehire, not whether they were actually rehired. [45/] The most reliable evidence of that is the Employer's pattern of employment over a number of years, and this was not produced.

The five employees in question are distinguishable from the "on call" employees in Rod McLellan Co., 3 ALRB No. 6 (1976) whom the Board said were indistinguishable from seasonal employees who had not yet been hired for harvest. The two employees in that case worked sporadically part of the year for the. Employer as needed, but received no wages during the relevant eligibility period. The laid off employees in this case worked substantial periods of time for the Employer prior to their layoff and received employee benefits in the form of housing in the Vineyard's labor camp during their layoff which included the relevant eligibility period. The record shows that labor camp housing was reserved for employees actually working or employees laid off with an expectation of rehire. While Raymond may not have personally known or given permission to the five employees to live in the camp after layoff, the evidence shows that

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44/See NLRB v. Atkinson Dredging Co., 329 F.2d 158, 55 LRRM 2598 (4th Cir. 1964), cert, denied 377 U.S. 965 (1964) , in which the court found employees laid off with a reasonable expectation of rehire eligible to vote where the employer's hiring history showed that employees adjusted to business and workforce fluctuations by turning temporarily to other employment.

45/NLRB v. Jesse Jones Sausage Company, supra, note 35.

foreman Lopez knew of their residence and did not ask them to leave. Lopez shared responsibility for housing at the camp with Raymond and was the Employer's agent in this regard so that his conduct must be considered that of the Employer. Based on this evidence, the clear inference is that the five employees continued to live in the camp with the Employer's consent because they had an expectation of rehire at harvest. Finally, foreman Hall told four laid off employees that they could continue living at the Yountville camp until work became available at harvest. While I do not feel that Hall had the authority to permit the employees to remain in the camp, his statements about the likelihood of rehire carried substantial weight because of his power to hire with Raymond's approval. His testimony is supported by Lopez's later statement to two of the employees that he had their names on the list for rehire and his consent to their continued residence in the camp.

It is possible to infer from Lopez's statement and Manuel Medina's residence in the Yountville camp that Medina was laid off and had a reasonable expectation of rehire, however, there is a lack of direct evidence that he worked for the Vineyard during the year. Because of certain gaps in the payroll records and the absence of time cards for the entire year, I cannot conclude with certainty that he was not an employee, but I find the evidence of layoff and expectation of recall less convincing than that produced for the other employees in question and do not find him an employee laid off with an expectation of rehire.

As to the remaining five employees, I find that they were laid off with reasonable expectation of rehire and should have been

onsidered employees during the payroll period used to determine voter eligibility. During this period they were on the payroll in

that they were receiving compensation in the form of housing in return for being present and available for harvest work which they expected because of statements and promises made by the Employer's foremen.

D. Current Payroll – Eligibility of Clerical Employees and Assistant Foreman

Two clerical employees, Mary Jane Rossi and Enriquetta Dunck, were not included on the list of eligible voters even though they worked for the Employer in the relevant payroll period for determining eligibility. Neither attempted to vote in the election and their exclusion from .the list was not raised by either party prior to the election. Neither was included among the employees working in the peak agricultural period.

Rossi was Raymond's personal secretary. She performed general office duties, including answering the telephones, typing, preparing payroll records compiled from time cards for computer processing, and operating the Vineyard's radio. Rossi also typed election materials, such as a comparison of wages used in the election, for Raymond. She also typed or copied all of the materials introduced as Employer exhibits at the hearing. Dunck did not testify at the hearing. Rossi stated that her duties were similar to her own.

office personnel performing routine clerical tasks are generally considered agricultural employees, unless they act in a confidential capacity to persons responsible for an employer's labor-management relations policy. [46/] Where the latter is true, the employee is termed a confidential employee and ineligible to

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46/ Anderson Farms Co., 3 ALRB No. 48 (1977).

vote. [47/] The evidence shows that Raymond is the person responsible for the Vineyard's labor relations policy. Since Rossi and Dunck's duties require that they perform work for Raymond in connection with that policy, they must be considered confidential employees who were properly excluded from the list of eligible voters.

Ed Tonito was a mechanic-assistant foreman under shop maintenance foreman Guy Sculatti. Unlike the seasonal agricultural employees, Tonito received a salary and a paid vacation. Ranch foremen and the clerical employees were also salaried and received paid vacations. Tonito could not hire and fire, but could recommend discipline. Raymond testified that he did not consider Tonito a leadman. He was not included as an agricultural employee in either the peak or the current payroll periods, did not appear on the list of eligible voters, and did not attempt to vote in the election.

Supervisors are excluded from eligibility to vote in elections for bargaining representatives. A supervisor is any person having the authority to do a number of acts enumerated in Labor Code Section 1140.4(j) so long as the exercise of authority is not of a merely routine or clerical nature, but requires the use of independent judgment. [48/] Among these acts which may make a person a supervisor is the authority to effectively recommend discipline. Given the description of Tonito's duties and power to recommend discipline, his title as assistant foreman, and testimony by Raymond that he was not a leadman, I find that he was a supervisor under the Act and properly excluded by the Employer from the list of eligible voters.

47/ Hemet Wholesale, 2 ALRB No. 24 (1976).

48/ See Dairy Fresh Products, 3 ALRB No. 70 (1977); Prohoroff Poultry Farms, 2 ALRB No. 56 (1976).

E. Current Payroll -— Eligibility of Two Employees Challenged as Not in the Bargaining Unit

Two employees, Frank Sculatti and Daryll Shaw, appeared on the list of eligible voters, but were challenged at the election by the UFW on the ground that they were not in the bargaining unit. No evidence was introduced at the hearing by either party to substantiate the challenges, therefore, they must be considered as agricultural employees and eligible voters.

V. Peak Agricultural Employment

A. Peak Payroll Period - Employer Figures

The Employer's peak employment occurred prior to the election in the week of May 18 through 24. The number of employees working on each day in this period were as follows:[49/]

Day	5/18	5/19	5/20	5/21	5/22	5/23	5/24
Employees	-0-	121	127	128	128	129	-0-

In this period, May 18 was a Sunday and May 24 a Saturday. The same group of 129 persons worked in this week although all 129 did not work every day of the period.

B. Peak Payroll Period - UFW Argument

Prior to the hearing, the UFW sought to subpoena certain records and documents showing payroll for agricultural employees for years preceding and following the calendar year of 1975 in which the

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49/ These figures are based on the totals on the monthly summary in Employer Exhibit 1 with a correction. At hearing the Employer's counsel represented as an officer of the court that he had checked daily time cards entered in evidence as Employer Exhibit 2 against the monthly summary and found three other employees who worked in the period. Because time cards are the foundation for the summary, he would show 121, 127, 128, 128, and 129 employees working this week. *I* have checked the cards and have been unable to locate the three employees to which Employer's counsel refers. One employee was Ed Tonito who evidence shows was a supervisor and properly excluded. From the evidence it appears that Employer's counsel inadvertently stated that additional employees had worked in the period, when he meant three of the 129 employees had worked on days shown on the time cards, but not on the monthly summary.

election was held and showing acreage farmed by the Employer, grape production, and production activities engaged in by employees from 1973 to the time of the hearing. This hearing officer revoked the subpoena as to those matters which did not relate to the then current calendar year of 1975. At the hearing, parties were given an opportunity to reargue the revocation of the subpoena. The UFW offered to prove by the evidence which would be obtained pursuant to the subpoena that the period which the Employer claimed was its period of peak agricultural employment was an unusual, if not unique, period in terms of the Employer's practices and that the number of employees employed at that time were not employed at any time prior to or since, and that evidence, which the UFW was not permitted to obtain due. to revocation of the subpoena, would substantiate its legal argument that the period should not be considered controlling for purposes of determining peak agricultural employment. Specifically, the UFW contended that peak employment in wine grapes usually occurs at harvest and that the reason it did not occur in 1975 at harvest was the planting of new vines in May, including the week, claimed to be peak. Normally Beringer has a fairly stable year-round workforce and the special planting did not occur before or after 1975, therefore, May 1975 must not be considered for purposes of measuring peak. The UFW argues that these facts require the peak be determined by examining normal pattern of employment for calendar years before and after 1975 for years when no special planting was done. For reasons discussed below, evidence which was the subject of this offer of proof and that sought by the subpoena duces tecum were found not relevant under existing Board precedent to the inquiry into peak.

CONCLUSIONS OF LAW

A petition for certification is timely filed when an

employer's current payroll reflects 50 percent of peak agricultural employment for the current calendar year. [50/] The peak requirement is intended to ensure that a representation election is conducted at a time when a representative number of an employer's employees are present and eligible to vote.

Because employment patterns vary from crop to crop and from employer to employer, the Board has recognized the need for a variety of methods for determining whether this peak requirement is met. These various methods permit the peak determination to be made on the basis of standards which are flexible enough to permit resolution of the overriding question of whether a representative vote is possible at a given point in time without the constraints imposed by the rigid application of a purely mathematical formula which may not be applicable to the factual situation. In Mario Saikhon, Inc. 2 ALRB No. 2 (1976), the Board held that, where an employer's

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50/Labor Code Section 1156.4 which provides as follows:

> "1156.4. Recognizing that agriculture is a seasonal occupation for a majority of agricultural employees, and wishing to provide the fullest scope for employees' enjoyment of the rights included in this part, the board shall not consider *a.* representation petition or a petition to decertify as timely filed unless the employer's payroll reflects 50 percent of the peak agricultural employment for such employer for the current calendar year for the payroll . period immediately preceding the filing of the petition.
>
> "In this connection, the peak agricultural employment for the prior season shall alone not be a basis for such determination, but rather the board shall estimate peak employment on the basis of acreage and crop statistics which shall be applied uniformly throughout the State of California and upon all other relevant data."

workforce fluctuated greatly because of turnover, a proper method for determining peak was to take an average of the number of employee days worked on all days of a given payroll period. In later cases the Board found that this method had to be modified where there were different payroll periods for different groups of employees,[51/] or where a given payroll period contained Sundays or other days which were not representative of the employee complement on other days in the period. [52/] In still later cases,

the Board has indicated that proper method for determining whether an employer's payroll reflected 50 percent of peak would compare the number of eligible voters to peak agricultural employment. [53/] Thus, in Kawano Farms, Inc., 3 ALRB No. 25 (1977), the Board held that the regional director was free to rely on the two relevant payrolls supplied by the Employer and that, the 649 employees in the current payroll easily reflected 50 percent of the 930 employees employed later that year at peak season and of the 796 employees during the Employer's peak the preceding year.

The legal question in this case is whether the Board's decision in Ranch No. 1 controls in all respects the correct method to be applied to the facts of this case in order to determine whether the petition was timely filed with respect to peak. The

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51/ Luis A. Scattini & Sons, 2 ALRB No. 43 (1976).

52/ Ranch No. 1, Inc., 2 ALRB No. 37 (1976).

53/ Valdora Produce Company, 3 ALRB No. 8 (1977); Kawano Farms, Inc., 3 ALRB No.25(1977).In Valdora, the Board made it clear that the current payroll was not limited to persons on a piece of paper, but would include the persons such as employees absent due to illness or vacation, who would be eligible to vote.

decision in Ranch No. 1 was primarily concerned with application of a variation of the method of averaging employee days worked first set[1] forth in Mario Saikhon, Inc.. Ranch No.1, elaborated on the Saikhon formula in holding that unrepresentative days could be excluded in computing the average number of employee days worked in the relevant payroll periods. Later cases, however, indicate that another proper method for computing the 50 percent of peak requirement is to compare the number of eligible voters with the Employer's workforce which represents peak agricultural employment. Thus, Ranch No. 1, is not controlling on what number, eligible voters or average number of employee days worked in the current payroll period, is to be compared to peak agricultural employment to determine whether peak is reached.

The UFW does not contest that the highest period of employment at Beringer in 1975 occurred .in the week ending May 24, but argues that this employment figure alone should not be considered peak agricultural employment because it represented an abnormal pattern of employment. Specifically, the UFW offered to prove, through documents sought in its subpoena duces tecum, that the normal pattern of employment at Beringer was one of relative stability, that levels reached in the spring of 1975 were unique for

the period from 1973 to the present, that planting was performed on newly acquired land and that this planting and tending of new vines was unique to the spring of 1975, that resulting high employment level had never been reached before or since, and that workers doing planting completed job and did not continue in the employ of Beringer.

In Ranch No. 1, the Board interpreted Labor Code Section 1156.4 to mean that the Board is required "to take into account crop and acreage statistics only when it is alleged that peak will occur at some future point in the calendar year." Where peak had already occurred in a year, the Board stated that no supplemental data on crop or acreage statistics was necessary to determine whether the peak requirement was met. Under this precedent, the records requested by the UFW for calendar years other than 1975 were not relevant since the issue was not one of prospective peak.

In this case the peak agricultural employment occurred prior to the election in the week ending May 24. No employees worked on Saturday and Sunday in that week. The number of employees working Monday through Friday were either 121, 127, 128, 128, and 129 or 122, 126, 127, and 129 depending on which of the Employer's records is used. Since Raymond testified that the daily time cards were the most accurate reflection of work performed and formed the basis for the monthly summary sheet introduced as Employer Exhibit 1, I conclude that the former set of figures represents the number of employees working on the days in this period. As will be seen, the peak requirement is met regardless of which set of numbers is used.

Under the Employer's Ranch No. 1 approach to peak in this case, the number of employees working each day would be added to produce a total of 633 employee days worked. Excluding an

unrepresentative Saturday and Sunday when no employees worked and dividing by five days then produces 126.6 average employee days worked.

The Employer would then make an identical computation for the payroll period preceding the election. Adding 56, 57, 48, 43, and 48 employees working on the days in this period produces 252 employee days worked, which when divided by five days, produces 50.4 average employee days worked. The Employer would not include the three disabled employees and five employees laid off with a reasonable expectation of rehire whom I determined were eligible voters in making its computations. [54/]

The Employer correctly applied the Ranch No. 1 method of computing peak to the facts in this case, but *I* find that method inappropriate under the facts of this case. First, for the reasons stated above, I find that the eight employees incorrectly excluded from eligibility are relevant to the peak determination and should have been included on the payroll as eligible voters. [55/] Second, the specific rationale which led the Board to develop the averaging method used in Mario Saikhon, Inc. and Ranch No. 1 is not present in this case. There is no daily turnover of the kind present in those cases, such that the number of employees for the peak period

54/ The Employer notes that even if such employees were included, the peak requirement still would not be met under its method of calculation.

55/ I note that seven and perhaps all eight, of the employees added to the eligibility list also worked in the peak employment period. The Employer's method would count these employees at one end of the comparison, but exclude them as representative voters at the other.

equals substantially more than the number of employees employed on any one day. There is no change in the 129 employees who work in peak period other than the number of them working on any given day. Since peak agricultural employment is an estimate of the number of employees required to perform specific agricultural labor on a given acreage of a particular crop, it might be proper to average in this period. On the other hand, the actual number of employees working in the peak period may also be reflective of the Employer's needs in this case.

The current payroll period must be compared to this peak agricultural employment to determine whether the peak requirement is met. Unlike peak agricultural employment, the current payroll represents a real number of employees eligible to vote. The sole concern is whether the eligible employees reflect 50 percent of peak agricultural employment so that their votes can be considered representative of the wishes of the Employer's workforce. The language of Labor Code Section 1156.4 with respect to peak and that of Labor Code Section 1157 on eligibility to vote is identical in referring to the current payroll preceding the filing of the petition. As discussed above, payroll does not refer to a particular piece of paper. Certain employees are eligible to vote and considered to be on the payroll even though their names do not appear on the actual payroll list. In this case, the payroll consists of the 57 employees on the list plus three disabled employees and five others laid off with a reasonable expectation of rehire for a total of 65 employees. Since 65 is more than 50 percent of either the 126.6 obtained by averaging, or 129 obtained by employee count, the petition was timely filed with respect to peak.

RECOMMENDATION

Based on the findings of fact, analysis, and conclusions, I recommend that the Employer's objections be dismissed

and that the United Farm Workers of America, AFL-CIO be certified as the exclusive bargaining representative of all the agricultural employees of the Employer in St. Helena, Calistoga, Yountville, and Napa, California.

DATED: October 26, 1977

Respectfully submitted,

JAMES FLYNN
Investigative Hearing Examiner

EXHIBITS

Employer

1. Monthly register for January to June, 1975.
2. Daily time cards for May 18 to 24, 1975.
3. Summary from daily time cards for payroll period from October 12 to 18, 1975.
4. Daily time cards for October 12 to 18, 1975.
5. Computer printout for October 12 to 18, 1975.
6. Daily tonnage reports for October 12 to 18, 1975.
7. Workmen's compensation claims for 1975.
8. Employer's reports of occupational injury or illness.
9. Checks issued by payroll period for 1975.
10. Computer printout payroll records for 1975.
11. Employment applications reflecting labor camp address for 1975.
12. Health benefit claims in four payroll periods preceding October 12 to 18, 1975.
13. Health benefit claims for May 1975 through December 1976.
14. Codes used on daily time cards.
15. Health claims for employees with no work on certain days from October 12 to 18, 1975.

UFW

1. Biviano Zamora
2. Salvador Cobian
3. Antonio Moya
4. Francisco Andrade
5. Rafael Curiel
6. Ramon Vargas Plancarte
7. Roberto Alonzo Mendez
8. Reuben Paniagua
9. Manuel Medina
10. Fernando Medina

ALRB

1. Order revoking subpoena duces tecum for employer records, petition to revoke, subpoena duces tecum

2. Petition for revocation of subpoena duces tecum for Board records.

The following is a list of where testimony by various witnesses appears on the official record. This should assist the parties in preparing exceptions and responses to the decision of the investigative hearing examiner which contain proper citations to the record. The first number is the tape cassette; the second is the approximate frame number at which testimony begins:

Tape	1-1	Opening statement of hearing officer.
	60	Reargument of revocation of UFW subpoena duces tecum,
Tape 2 -	250	Roy Raymond
Tape 3 -	1	Raymond
Tape 4 -	1	Raymond
Tape 5 -	1	Raymond
Tape 6 -	1	Simpson
	20	Simpson
	315	Mary Jane Rossi
Tape 7 -	1	Argument on subpoena duces tecum of Board records - continued
	215	Manuel Castillo
Tape 8 -	1	Castillo
Tape 9 -	1	Castillo
	140	Frank Lemus
	390	Roberto Lopez
	510	Roy Raymond
Tape 10 -	1	Raymond
	50	Dennis Hall
	205	Raymond
Tape 11 -	1	Raymond
	266	Hearing closed

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:

WINE WORLD, INC., dba,
BERINGER VINEYARDS,

Employer, Case No. 75-RC-50-S

and

UNITED FARM WORKERS OF
AMERICA, AFL-CIO,

Petitioner.

Gary P. Scholick, of Littler,
Mendelson, Fastiff & Tichy, for the
Employer.

Dianna Lyons, for the United Farm
Workers of America, AFL-CIO.

DECISION

Statement of the Case

JAMES E. FLYNN, Investigative Hearing Examiner: This case was heard before me on November 21, 1978 in St. Helena, California on remand from the Agricultural Labor Relations Board (hereafter the "Board"). By Notice of Reopened Hearing issued October 16, 1978, the Board directed that evidence be taken on the limited issue of whether the 1975 peak employment level of Wine World, Inc., dba, Beringer Vineyards (hereafter the "Employer" or "Beringer") was a unique one in that a similar peak was never reached either prior to or since that year.

All parties were represented at the hearing and were given a full opportunity to participate in the proceedings. Because of the novel legal issue involved, both parties requested and were given the opportunity to submit post-hearing briefs. These briefs were filed on December 19, 1978, together with *a* stipulation as to certain evidence introduced at hearing.

Upon the entire record, including my observation of the demeanor of the witnesses, I make the following findings of fact, conclusions and recommendations.

Finding of Facts

I. Petitioner Contention: Unique Peak Employment

The Employer filed objections to a representation election conducted on October 27, 1975. The objections set for hearing alleged that the certification petition filed by the United Farm Workers of America, AFL-CIO, (hereafter the "UFW") was untimely in that the peak employment requirements of Cal. Lab. Code §§ 1156.3 and 1156.4 were not satisfied.

The UFW contended that the election was conducted at a time when the current payroll reflected 50 percent of peak agricultural employment and offered several alternative theories in support of this argument. This hearing officer found merit in one theory, but revoked in part a UFW subpoena duces tecum for information relevant to the theory at issue in the reopened hearing based on an interpretation of relevant statutory provisions and the Board's decision in Ranch No. 1, 2 ALRB No. 37 (1976). Under this latter theory, the UFW argues that the Employer's peak agricultural employment in 1975 was unique and was only matched in one other year between 1960 and 1978. Because of that fact and evidence

that the peak agricultural employment was consistently lower in every year after 1975, the UFW argues that the number of eligible voters in 1975 was representative of the Employer's work force and that the statutory peak employment requirements were met.

II. The Evidence

The Employer is a corporation owned by the Labruyere family in Prance. Its primary functions are the management of land devoted to the growing of wine grapes and the production and marketing of wine. The land managed by Beringer is located primarily in the Napa and Sonoma Valleys and is owned or leased by Crosse & Blackwell Preferred Vineyard Properties. It includes both producing vineyards and land which is either bare or in some stage of development into vineyards.

Beringer also operates a winery with a capacity of 5,000 gallons. The winery produces California wines from grapes grown on managed land or from grapes purchased under contract from other growers in the North Coast Counties, Santa Barbara County, and the San Joaquin Valley. The Employer then markets these wines under the Beringer and Los Hermanos labels and also European wines imported from France, Italy, and Germany under the Crosse & Blackwell label.

Evidence relevant to the Employer's peak agricultural employment was introduced for calendar years 1960 through 1978. Some evidence was also produced on Beringer's future plans for calendar year 1979 and subsequent years. The evidence indicates that the size of Beringer's agricultural work force fluctuates over a period of years in response to a number of variables. The most significant of these is the Employer's projection of market

demand for its domestic wines. Richard Maher, the Employer's president, testified that Beringer periodically does long-term projections of the number of bottles of its particular wines it expects to sell. This tells the Employer how many gallons of a particular wine will be needed. Beringer then determines what percentage of various grape varietals are used in its wines and estimates the number of gallons of each varietal needed to meet its projected sales. This gallon figure is used in turn to calculate the number of tons of each varietal needed. By comparing the tonnage figures for each varietal needed with Beringer's actual available tonnages from existing plantings or contract purchases, the Employer is able to determine its long-range need to purchase or sell grapes.

Beringer makes a number of decisions based on these projections of supply needs. The most critical decision relating to the number of agricultural employees to be employed is whether new vineyards are to be developed to meet a shortage of grapes or existing vineyards sold or replanted to meet an oversupply of a certain varietal. Roy Raymond, Beringer's vineyard manager, testified that the agricultural work is generally divided into work on development of new vineyards or on production tasks connected with existing vineyards. This work is carried on simultaneously in many months of a given calendar year. In a typical year, employees would do pruning and tying of vines on producing vineyards in January, February, and March. Development work on new vineyards would be done only if rainfall was sufficiently light to allow work to be done. In March and April, employees

would do tractor driving operations? cleaning, tying and pruning vines; and frost protection on producing vineyards. Development work on new vineyards generally would begin in May as the rains stopped and would continue until October or November when the rainy season began. Employees doing development work would clean fields, disc, stake, lay out new fields, plant, and irrigate. Production operations like suckering, irrigating, and pesticide application would be done at the same time until July and August when production work tapered off. The Employer would then watch the grapes and perform other limited production tasks until grapes reached the desired sugar levels and were ready for harvest in the months of September, October, and November. December was a slack month in which the number of employees was generally lower than at any other time during the year.

From 1960 to 1971, Beringer did not engage in any significant development work on new vineyards. The Employer planted 500 acres in the six years between 1960 and 1965 with no more than 175 planted in a single year. An average of less than 50 acres a year was planted in the other years prior to 1972,

In the early 1970's a boom in the wine industry occurred which led a number of large corporations to invest in the industry. Extensive planting and development of new vineyards occurred in the Napa Valley and throughout California, particularly in varietals such as Pinot Noir, Cabernet Sauvignon, and Pinot Chardonnay. Beringer was part of this development boom. In 1972 it planted approximately 126 acres of new vineyards and followed this with plantings of 393 and 735 acres in 1973 and 1974 respectively.

The number of employees employed by Beringer in these years of large scale development of new vineyards increased since development work went on from May through October at the same time that production work was being done on producing vineyards. Thus, the largest payroll for Beringer in 1973 was 101 employees. In 1974, this figure rose to 138 which was the highest number of employees on a payroll at any time between 1960 and 1978, The high employment levels for these two years was consistent with Raymond's testimony that it takes approximately three or four years, of which the first two are most labor intensive, to develop and bring new vines into production. For example, 66 workers did harvest work and 35 other work on October 3, 1974.

The expected increase in wine sales which had produced these high employment levels did not materialize to the extent expected, leaving Beringer with a large oversupply of grapes and plans to develop even more new vineyards. On February 1, 1975, the Employer hired Maher as its president to deal with its problems. Maher immediately began an assessment of Beringer's situation. After two months of study, he drafted a report dated April 2, 1975 in which he set forth the primary problems facing Beringer and suggested solutions. Maher's conclusion, which had the greatest impact on the size of the agricultural work force, was that Beringer had more grapes than it could sell. Furthermore, Maher found that Beringer had an imbalance in its grape mix. that is, it had more red varietals, primarily Cabernet Sauvignon, than white.

To correct the oversupply problem, Maher then initiated a number of actions. Sometime in March, 1975 he directed vineyard manager Raymond to stop all planting of new vineyards. According

to Maher, Beringer had intended to plant 200 acres of new vines in 1975. Maher also ordered Raymond to stop all development work on previously undeveloped land. Beringer also modified five leases it had with other growers by postponing its obligations to plant new vines on their land. At the same time, the Employer attempted to get growers in other parts of California, who had contracts to deliver grapes to Beringer, to cutback on or terminate their deliveries. Finally, a planned increase in the capacity of the winery to 18,750 gallons was limited to 5,000 gallons.

Beringer completed work on the land on which development had begun in 1973 and 1974 and did extensive replanting of existing vines which had been damaged by Pierce's disease. Raymond testified that after this work was completed in the spring he told foremen to determine which employees would be laid off because Beringer was ceasing further development of new vineyards until further notice. Layoffs were made in June and July, 1975. Raymond testified that he personally or the foremen told employees the reasons for the layoffs.[1/]

This cutback in development work contributed to a much lower number of employees working at harvest in 1975 than in the previous two years in which some development work had gone on

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1/The Employer's post-hearing brief requests me to reconsider my previous finding that certain employees laid off in July did not have a reasonable expectation of re-employment at the time of the election on the basis of this testimony. I decline to do so for two reasons. First, this issue was not noticed for hearing on remand and was not fully litigated. Second, Raymond's testimony while relevant does not conclusively show that the five employees were among those who were to be permanently, as opposed to temporarily, laid off. I note that three of the five in fact returned to work in years subsequent to 1975.

during harvest. In addition, the harvest work force was lower than in the past because in 1975 the Employer began experimenting with a mechanical harvester. Thus, while the spring work force numbered approximately 129 employees at its highest point, when previously started development work was completed, the number of employees at harvest never exceeded 57.[2/]

The moratorium on major development work continued for the next three years, although some development work was done on 85, 8, and 72 acres in 1976, 1977, 1978 respectively. The land developed in 1977 and 1978 included, some of the leased land on which Beringer had gotten a postponement of its planting obligations in 1975. In this same three-year period, Beringer sold approximately 487 acres of development and production land. No new leases were acquired by Beringer since 1975.

Beringer also continued to use mechanical harvesters from 1975 to 1978, with one machine being used in 1975 and 1976. One or two machines were used in 1977. Beringer used three machines in 1978, one of which was supplied under contract. Maher testified that three machines were used because hot weather in the fall of 1978 shortened the ripening period and made it necessary to use mechanical harvesters to harvest large acreages devoted to certain grapes, principally Cabernet Sauvignon at the Gamble Ranch. The decision was apparently made on the advice of Raymond that a

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2/This figure reflects the highest number of employees appearing on a harvest payroll as reflected by Employer Exhibit 9. I have found in my earlier decision that eight other employees who were either on disability leave or laid off with a reasonable expectation of re-employment were also eligible voters and should have been counted for purposes of determining whether the peak requirement was satisfied.

sufficient number of harvest employees could not be found to do the necessary work in the time available.

The combination of diminished development work and use of mechanical harvesters produced peak employment figures significantly lower than in previous years. Thus, the highest numbers of employees in any payroll period during 1976, 1977, and 1978 were 79, 75, and 74 respectively. The highest numbers of employees at harvest in these same years were 77, 70, and 68.

Maher testified that the wine industry was again anticipating a large increase in wine sales in the 1980s based on projections of increases in the per capita consumption of wine by Americans. Beringer's capital investment proposal for 1979 included plans to plant more than 300 acres of new vineyards. Maher stated that together with plans to graft some white varietals onto 100 acres of red varietal root stock this would increase the number of employees working again and begin to produce peak employment levels comparable to the years 1973, 1974, and 1975.

Conclusion

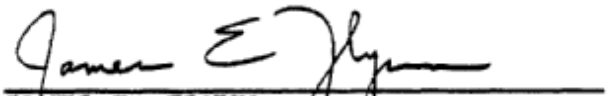
I make no conclusions as to whether in light of this evidence the peak requirements of Cal, Lab. Code §§ 1156.3 and 1156.4 were satisfied. The issue is one of first impression and involves interpretation of the statute and Board precedent which appears to limit evidence on peak agricultural employment to the calendar year in which the election is held unless an employer contends that peak agricultural employment will not be reached until some time after the election. See, Ranch No. I, supra.

A question involving statutory interpretation and overruling, distinguishing, or upholding Board precedent is one for the Board itself. The facts are not in substantial dispute.

Therefore, under 8 Cal. Admin. Code §20365 (f) (7), I certify the legal question at issue to the Board. Parties have already submitted extensive legal arguments in support of their respective positions, but have 14 days from service of the notice of certification of the issue to the Board to file additional arguments or exceptions to the findings of fact contained in this decision.

DATED: January 29, 1979

Respectfully submitted,



JAMES E. FLYNN
Investigative Hearing Examiner